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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CRYSTAL CAMMACK MEDINA

Petitioner

vs

ANTHEM LIFE INSURANCE COMPANY

Respondent

On Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the United States District Court and the United States Court of Appeals have recognized a federal common law cause of action permitting the Petitioner, Crystal Cammack Medina, to recover extra-contractual damages for tortious processing of her claim for benefits from an employee benefit plan?

2. Should the United States District Court and the United States Court of Appeals have dismissed the lawsuit of the Petitioner, Crystal Cammack Medina, for certain benefits pursuant to 29 U. S. C. § 1132 (a) (1) (B) because she did not exhaust administrative remedies for additional benefits to which she was entitled, but which she did not claim by way of her lawsuit?

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The Petitioner, Crystal Cammack Medina, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on January 28, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, whose judgment is herein submitted for review, was released for publication, and is attached to this Petition as an Appendix, at pages 61. The prior opinions of the United States District Court for the Northern District of Texas were not reported, but are reprinted in Appendices to this Petition, at pages 81 and 89.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on January 28, 1993. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Article III, Section Two:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be a Party; -- to Contro-

versies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same States claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

The Petitioner, Crystal Cammack Medina, brought suit pursuant to 29 U. S. C. § 1132 (a) in State District Court. The Respondent, Anthem Life Insurance Company, responded by paying all of the benefits she claimed by way of her lawsuit (it did not pay other benefits to which she was entitled, but which she did not seek to recover by way of her lawsuit) and removing the lawsuit to United States District Court.

There, the Petitioner, Crystal Cammack Medina, sought to amend her complaint to include a cause of action " . . . to recover, in addition to benefits, consequential and punitive damages in addition to the remedies already pled for; . . ." pursuant to

the federal common law of ERISA. However, the United States District Court refused her permission to so amend her complaint, explaining that such an amendment would not state a claim for relief cognizable pursuant to federal law.[1]

The Respondent, Anthem Life Insurance Company, then moved the United States District Court to dismiss the remainder of the lawsuit (for clarification of rights to future benefits, injunctive relief, and costs of suit) on the ground that the Petitioner, Crystal Cammack Medina, had not exhausted administrative relief available to her to recover the benefits which she did not seek to recover by her lawsuit. The United States District Court granted that motion.[2]

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[1] Order of November 12, 1991.

[2] Order of January 3, 1992.

The United States Court of Appeals for the Fifth Circuit affirmed these rulings by the United States District Court.[3]

BASIS FOR JURISDICTION IN UNITED STATES DISTRICT COURT

The jurisdiction of the United States District Court for the Northern District of Texas over this case was based on Article III of the United States Constitution, 29 U. S. C. § 1132 (e) (1), and 28 U. S. C. § 1441 (a).

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[3] *Medina v. Anthem Life Insurance Co.*, 983 F. 2d 29 (5th Cir. 1993).

REASONS FOR ALLOWANCE OF THE WRIT

Introduction

The Court should issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in this case because federal courts in so many circuits across the country have shirked their responsibility to develop a federal common law which defends against threats to the effective implementation of the Employee Retirement Income Security Act of 1974 ("ERISA"),[4] the accomplishment of its aims, and the financial security of ERISA plan beneficiaries. Despite the Court's recurrent prescription regarding the development of such a federal common law, and despite the Court's

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[4] 29 U. S. C. § 1001 *et seq.*

repeated explanation that the responsibility to develop a federal common law of ERISA derives from the patterning of ERISA and its pre-emption provisions on the Labor-Management Relations Act of 1947 ("LMRA"),[5] many federal courts persist in disbelieving that the Court sincerely desires the development of such a federal common law of ERISA. Instead, these federal courts typically rely upon the Court's refusal to find "implied" causes of action in ERISA's language, and announce that change will be forthcoming only when " . . . a more plausible signal reaches us from above."[6] The

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[5] 29 U. S. C. § 185 *et seq.*

[6] *Harsch v. Eisenberg*, 956 F. 2d 651, 660 (7th Cir.), *cert. denied*, ____ U. S. ____ , 113 S. Ct. 61 (1992); ; *Medina*, 983 F. 2d at 32.

Court should issue a writ of certiorari in the instant case for the purpose of sending just such a signal.

Three decades ago, a very few insurance companies invented practices designed to deprive American workers of employer-sponsored retirement benefits.[7] Once the need for payment of

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[7] 120 Cong. Rec. 29934-35 (1974) (Remarks of Senator Jacob K. Javits, who was a co-author and prime sponsor of ERISA):

> In Cleveland, William Wheeler of Findlay, Ohio, testified he was an employee of the GarWood plant for 42 years. When it was sold to Sargent Industries, who close the Findlay plant in 1970, his union committee told him if he wanted anything out of his pension plan he had better take it then.
>
> Mr. Wheeler said:
>
> I went down to the office and signed up for my pension, so here is the damn paper they give me. It don't mean nothing. Forty-two years -- 30 years of creditable service. So I retired thinking of that damned little pension of $134 monthly from which I had to take a $11.77 deduc-

tion for retiring a year and nine months early.

Then he got a letter from Sargent Industries, GarWood Division, saying his pension would be slightly cut. He said:

Well, I call it a hell of a slight cut. They cut me back to $46.02 a month after 42 years of working in that shop.

The pensions of 500 people were affected by this shut-down. Of these, only the 112 already retired received any pension, and they were forced to take a 62-percent cut. The money simply was not there.

The situation was much the same when Studebaker closed its plant, employing nearly 7,000 men and women in South Bend, Indiana. The pension plan was able to pay only 15 cents on the dollar of the "vested" benefits of 4,500 employees, ages 40 to 59, who had 10 years or more of service.

In Philadelphia, 73-year-old Leon Grimes, who had worked for Horn & Hardart Baking Co. for 37 years, recalled when he was asked to retire -

They called me into the office and said "Grimes, it is almost time for you to go out," Well, I said, go out for what? I am not ready to retire.

But he was forced to retire on a pension of $59 a month. Then, 4 years later, this was terminated -- for him and 167 other former Horn & Hardart employees who had retired; 600 others were told they would get pensions for only 9 more months. These pensions were being paid not from a funded insurance plan, but out of operating revenues. The company could not spare those revenues any longer. Too bad for the pensioners and for those who expected pensions.

Many workers are led to believe they are covered by a good pension plan because of nicely phrased booklets and other assurances handed them by their employers. When the time comes for the payoff, they learn that the cold legal phrasing in pension contracts says otherwise.

At hearings in Philadelphia, George Allen, who after 32 years with one company was laid off 5 months before be-

coming eligible for a pension, said:

You see, all of these pensions are done up by corporation lawyers and against people, say working people with a high school education, and as everybody knows, there's no competition.

In Newark, Raymond Sagendorf, 57 years old, testified he needed 1 more year to qualify for a pension after working for a brewery for 29 years, and was now out of a job. Speaking of Chairman Williams, he said:

Senator, I have here books on the pension plan that ain't worth a quarter because I can't understand it. I don't know anything about it, and I defy any trustee of our plan to explain this to me . . . you have people running the pension plan that don't even understand it themselves.

Or as John McGrath, who had worked for the same company, explained -- "The worker today has trust." McGrath had not looked into his pension rights until after he learned he was 9 days short of 30 years -- and 9 days short of a pension - and out

of a job because the plant had closed.

Mr. McGrath said:

Maybe -- I know I was wrong - but, still and all, we were never really counseled on our rights. We may have got these things in the mail, but that was quite a few years ago. I don't know.

Perhaps an even more horrendous case than the foregoing, involved that of Robert E. Pratt of Hudson, N. Y.

In August of 1971, Mr. Robert E. Pratt of Hudson, N. Y. was laid off from Gifford-Wood Co. due to poor business conditions. In the meantime, the company was sold to Greer Industries, Wilmington, Mass., in June 1972, by Stowe-Woodward Co., Inc. of Upper Newton Falls, Mass., former owners of Gifford-Wood Co. Gifford-Wood manufactured coal extraction, materials handling and other machinery. It was a very old company that dates back to 1814.

On June 30, 1972, the Gifford-Wood plan was terminated. 3 months before Mr. Pratt's 65th birthday, Mr. Pratt had worked for Gifford-Wood Co. for 47 years.

When he applied for retirement benefits on attaining age 65 he was told he would receive nothing for his 47 years of service since the plan had been terminated on June 30, 1972, and there were funds available to pay retirement benefits only to those who had retired before that date. An "unofficial" note from an insurance agent advised Mr. Pratt to contact me for help since while "the company has no legal obligation to you -- there is definitely a question of the morality of choosing June 30, 1972, as the cut-off date or of not offering you something for your 47 years of service."

Mr. President, a pension reform law is now a reality because of the hardship, deprivation and inequity suffered by American working people. It is their collective anger and disgust that put tremendous congressional and majorities behind this bill, and if we who espoused their cause in this body have sometimes not behaved in as gentlemanly a manner as is customary -- and I hope those aberrations of conduct have been rare -- it is because we too shared their sense of indignation and frustration over what often seemed to be a cynical

benefits arose, the workers, having already paid the premiums and by definition faced with critical financial need, were in no position to bargain on equal terms with their insurers.

States moved to fight these practices and to protect the financial security of retiring workers by adopting causes of action affording remedies for injuries inflicted by practices.

> disregard of fundamental American concepts of fairness and decency by some of those who managed the private pension funds.
>
> The agony of years of frustrated and disappointed beneficiaries has now come to an end. The discipline of law will enable this and succeeding generations of workers to face their retirement period with greater confidence and greater security -- and for this achievement we owe a debt of everlasting gratitude to those who brought their problems to the Nation's attention and testified freely and vividly to the need for pension reform.

However, the measures adopted varied from State to State. The effectiveness of the measures likewise varied from State to State. Furthermore, honest employers and insurers found compliance with all of the varying State-law mandated requirements administratively onerous; their only recourse was to pass on the resultant additional expenses to their employees in the form of reduced benefits and higher costs of participation in retirement plans. The ultimate result was the worst of all worlds: (1) fewer workers participated in employer-sponsored retirement plans; (2) those who did participate received fewer benefits and inadequate protection from dishonest practices; and (3) more workers were compelled to turn in their retirement to the social welfare

services of the National and Local Governments.

After many years of debate, Congress enacted ERISA " . . . to promote the interests of employees and their beneficiaries in employee benefit plans."[8] Undeniably, one of its aims was to increase the quantity of retirement funds contained in employee benefit plans through a reduction of the administrative costs of operating such employer-sponsored plans by displacing often conflicting and ineffective State regulation of such funds.[9]

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[8] *Ingersoll-Rand Co. v. McClendon*, 498 U. S. 133, 111 S. Ct. 478, 482 (1990); *Firestone Tire & Rubber Co. v. Bruch*, 489 U. S. 101, 113 (1989); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983); see also, 29 U. S. C. §§ 1001a (c) (3), 1001b (c) (3).

[9] See *FMC Corp. v. Holliday*, 498 U.S. ____, ____, 111 S. Ct. 403, 408 (1990) ("To require plan providers to design their programs in an environment of differing State regula-

Congress certainly did not leave a vacuum in the place of the pre-empted State laws which sought to augment the security of those funds and their availability to American workers, though. Such inaction would have left retiring American workers victims of the same treacherous practices all over again. Rather, Congress enacted comprehensive, nationally applicable standards that provided workers protection from such practices.[10]

Had Congress not legislated these replacement protections, the federal courts could have certainly established them as a body of federal com-

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tions would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits."); see also *Shaw*, 463 U.S. at 105 n. 25.

[10] See, e. g., 29 U. S. C. §§ 1021-1031, 1081-1086, 1101-1114, 1051-1061, 1140.

mon law.[11] This is because Congress deliberately drafted ERISA on the pattern of the LMRA,[12] which this Court had interpreted approximately a decade earlier to authorize the displacement of the labor laws of the various States, and to mandate simultaneously the replacement of those laws with federal common law.[13]

During the intervening two decades, some insurance companies have developed alternative practices to serve the same purpose as those which Congress had explicitly prohibited. The States again responded by developing and implementing regulatory, statutory, and common law prohibitions

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[11] See *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 486.

[12] *Pilot Life Insurance Co. v. Dedeaux*, 481 U. S. 41, 54 (1987).

[13] *Textile Workers Union v. Lincoln Mills*, 353 U. S. 448, 456-57 (1957).

of such evils, as well as remedies for violations of those prohibitions. A dispute inevitably arose as to whether the pre-emption scheme of ERISA also pre-empted these after-arising prohibitions and remedies, or if that scheme displaced only those State laws existing at the time of ERISA.

Those advocating retention of the new State laws argued that Congress could not possibly have intended to pre-empt State laws which did not even exist at the time it enacted ERISA. More powerfully, those advocates argued that Congress, in seeking to augment the protection of American workers, intended to pre-empt only those State laws that were replaced with better, more effective protections. And it would be wholly contrary to the intent of Congress, they argued, to eliminate the protection of American

workers from unscrupulous manipulation of employee benefit funds by striking down the shields afforded them by the State laws and leaving no federal protection in its place.

On the other hand, leaving the new State laws in place would threaten one of the goals of ERISA: Reduction of the costs of administering employer-sponsored retirement plans by *replacement* of sometimes conflicting State causes of action deterring and remedying such activities with corresponding federal causes of actions and remedies.

The Court resolved the dilemma with its decision in *Pilot Life Insurance Co. v. Dedeaux.*[14] It began by holding that ERISA pre-empted the "Mississippi law of bad faith,"[15] even though that law did not conflict directly with the express terms of ERISA. The Court based this holding upon its repeated declaration that the express pre-emption clause of ERISA was as broad and as expansive as its language.[16] At first glance, this basis would seem sufficient.

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[14] 481 U. S. 41 (1987).

[15] *Pilot Life Insurance Co. v. Dedeaux*, 481 U. S. at 57.

[16] See *Shaw*, 463 U.S. at 96-100; *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981).

However, the Court continued, "The legislative history demonstrates that the pre-emptive force of § 502(a) was modeled after § 301 of the LMRA."[17] The reference to § 301 of the LMRA was more than superfluous afterthought, however. In fact, it provided the essential bridge to the solution of the second problem posed in the case: Leaving retired American workers with no protection against the new methods of depriving American workers of the benefits which they had earned over many years.

After holding that the Labor-Management Relations Act of 1947 preempted inconsistent State labor laws, this Court did not leave the Nation without any labor law in the absence

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[17] *Pilot Life Insurance Co. v. Dedeaux*, 481 U. S. at 54.

of further Congressional action. Instead, it declared:

> The question then is, what is the substantive law to be applied in suits under § 301 (a)? We conclude that the substantive law to apply in suits under § 301 (a) is federal law, which the courts must fashion from the policy of our national labor laws. . . .[18]

Likewise, in holding that ERISA pre-empted "bad faith" causes of action adopted by the States, this Court did not leave American workers with no protection against the new misappropriative practices which some insurers were employing. Instead, it noted that in patterning ERISA on the LMRA, Congress expected the Federal Courts to *pre-empt* State laws inconsistent with ERISA in the same manner that

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[18] *Textile Workers Union v. Lincoln Mills*, 353 U. S. at 456.

they *pre-empted* State laws inconsistent with the LMRA, but it also expected the Federal Courts to *replace* State laws inconsistent with ERISA in the same manner that they *replaced* State laws inconsistent with the LMRA: "[I]t is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans."[19]

The Court then proceeded to pre-empt "bad faith" causes of action adopted by the States, not because they were inconsistent with the express civil enforcement scheme of

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[19] *Pilot Life*, 481 U. S. at 56, quoting 129 Cong. Rec. 29942 (1974) (remarks of Sen. Javits). Compare, *Pilot Life*, 481 U. S. at 53 (1987) ("In enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules."), quoting *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

ERISA, but because they were inconsistent with the body of federal common law " . . . involving rights and obligations under private welfare and pension plans . . ." that the Federal Courts would formulate to redress the wrongs righted by the State laws:

> The expectations that a federal common law of rights and obligations under ERISA-regulated plans would develop, indeed, the entire comparison of ERISA's § 502(a) to § 301 of the LMRA, would make little sense if the remedies available to ERISA participants and beneficiaries under § 502(a) could be supplemented or supplanted by varying state laws.[20]

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[20] *Pilot Life Insurance Co. v. Dedeaux*, 481 U. S. at 56.

Subsequently, this Court has repeated " . . . that courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'"[21] And the expectation that the federal courts will develop such a body of federal common law obtains in the relevant bodies of Congress, to the point of influencing their work on the issue:

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[21] *Firestone Tire & Rubber Co. v. Bruch*, 489 U. S. at 110, quoting *Pilot Life*, 481 U. S. at 56.

The Committee believes that the legislative history of ERISA and subsequent expansions of ERISA support the view that Congress intended for the courts to develop a Federal common law with respect to employee benefit plans, including the development of appropriate remedies, even if they are not specifically enumerated in section 502 of ERISA. Since the issue of preemption in civil remedies under ERISA is within the exclusive purview of the labor committees of Congress, the Committee has, over the years, considered the option of amending the statute to encompass specifically several additional remedies. In light of the legislative history on this issue, however, the Committee believes such action is unnecessary. The Committee reaffirms the authority of the Federal courts to shape legal and equitable remedies to fit the facts and circumstances of the cases before them, even though those remedies may not be specifically mentioned in ERISA itself. In cases in which, for instance, facts and circumstances show that the processing of legitimate benefit claims has been unreasonably delayed or totally disregarded by an insurer,

> an employer, a plan administrator, or a plan, the Committee intends the Federal Court to develop a Federal common law of remedies, including (but certainly not limited to) the imposition of punitive damages on the person responsible for the failure to pay claims in a timely manner.[22]

Because the development of a federal common law of ERISA was proposed by neither party in *Pilot Life*, however, this Court merely held that ERISA pre-empted the "bad faith" causes of actions adopted by the States, without revealing what federal common law would replace such causes of action to address the abuses which those State laws were designed to deter and to remedy. Nor did it de-

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[22] Report of the Committee on the Budget, House of Representatives, 101st Congress, 1st Session, to accompany H. R. 3299, p. 55-56 (1989). See, *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U. S. 572, 595-96 (1980).

scribe the scope, the sources, or the nature of that federal common law. However, such a description may rightly be derived through deductive logic and by reference to the substitutional federal common law formulated in furtherance of the LMRA.

First, that federal common law must necessarily seek to prohibit the same unscrupulous practices that the displaced State laws of "bad faith" addressed, and to remedy violations of those prohibitions. Otherwise, the displaced State laws of "bad faith" would not be inconsistent with that federal common law, and this Court would not have found it necessary to hold that those State laws were pre-empted by ERISA.

Secondly, in describing the process of forging the federal common law that would be developed to replace the pre-empted labor laws of the various States, this Court wrote, "The range of judicial inventiveness will be determined by the nature of the problem."[23] This statement should be equally descriptive of the process by which the federal courts develop a federal common law of ERISA, since Congress expected the federal common law of ERISA to be developed in the same fashion as the federal common law of LMRA.

Finally, the federal common law of ERISA should be uniform throughout the Nation. This is because ERISA pre-empts the State laws of "bad faith" not because their aims are

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[23] *Textile Workers Union v. Lincoln Mills*, 353 U. S. at 457.

evil, or because the methods they use to achieve those aims are unacceptable, but because they pose the " . . . the threat of conflicting or inconsistent State and local regulation of employee benefit plans."[24] Nevertheless, "[S]tate law, if compatible with the purpose of [ERISA], may be resorted to in order to find the rule that will best effectuate the federal policy."[25]

Although this Court has not begun to formulate precisely such federal common law of ERISA, it has indicated the scope of its capacity to do so. *E. g.*, this Court has unanimously indicated that it would have been well

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[24] *Pilot Life*, 481 U. S. at 56, quoting remarks of Senator Harrison Williams, at 120 Cong. Rec. 29933 (1974).

[25] *Textile Workers Union v. Lincoln Mills*, 353 U. S. at 457. Compare, authority at footnote 6.

within its power to fashion a cause of action for compensatory and exemplary damages to remedy the firing of an employee for the purpose of avoiding the necessity of contributing to his pension fund, had not Congress already expressly formulated such a remedy.[26]

Exercise of the power to create federal common law is a responsibility " . . . in cases raising issues of uniquely federal concern.'"[27] By enacting ERISA after the pattern of LMRA, Congress has made the protection of the retirement funds of American workers just such a concern, and has entrusted that protective function to the Federal Courts.

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[26] *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 486.

[27] *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U. S. 77, 94 (1981).

Nevertheless, when the Petitioner, Crystal Cammack Medina, requested the United States District Court to permit her to amend her complaint " . . . to recover, in addition to benefits, consequential and punitive damages in addition to the remedies already pled for; . . ." pursuant to the federal common law of ERISA,[28] that court refused her permission to so amend her complaint, explaining that such an amendment would not state a claim for relief cognizable pursuant to federal law.[29]

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[28] R. II, 345.

[29] Order of November 12, 1991.

The United States Court of Appeals for the Fifth Circuit upheld that refusal.[30] It based the affirmance on its conclusion that the statutory language of ERISA did not permit the Court of Appeals to create a federal common law cause of action permitting recovery of extracontractual damages for torts suffered during the processing of claims for insurance benefits.[31] It based its refusal on this Court's pre-*Pilot Life* holding in *Massachusetts Mutual Life Insurance Co. v. Russell*[32] that no correlative *implied statutory* cause of action was intended by Congress.[33] It also cited

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[30] *Medina v. Anthem Life Insurance Co.*, 983 F. 2d 29 (5th Cir. 1993).

[31] *Id.*, at 31.

[32] 473 U. S. 134 (1985).

[33] This observation is not a barrier to the creation of such a federal common law cause of action, but is in fact a prerequisite to its cre-

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the decisions of two other Courts of Appeals to the same effect; those other Courts of Appeals also relied upon *Russell*.[34]

But the question in *Russell* was " . . . whether a private right of action for extracontractual damages should be implied [pursuant to *Cort v. Ash*, 422 U.S. 66, 78 (1975)] even if it is not expressly authorized by ERISA."[35] So reliance upon *Russell* is misplaced. This is because (1) a claim for relief pursuant to federal common law and a claim for relief pursuant to the implication of a Congressional enactment as described in *Cort*

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ation. This is because creation of such a federal common law cause of action would be precluded by Congressional creation of such a cause of action. See, *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. at 486.

[34] *Medina*, 983 F. 2d at 32.

[35] *Russell*, 473 U. S. at 145.

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are " . . . two quite different theories . . . ."[36]

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[36] *Northwest Airlines*, 451 U. S. at 90:

> That right may have been created in either of two ways. First, it may have been created by statute when Congress enacted the Equal Pay Act or Title VII. Even though Congress did not expressly create [the right], if its intent to do so may fairly be inferred from either or both statutes, an implied cause of action . . . could be recognized on the basis of the analysis used in cases such as *Cort v. Ash*, 422 U.S. 66, *Cannon v. University of Chicago*, 441 U.S. 677, and *Universities Research Assn., Inc. v. Coutu*, 450 U.S. 754. Second, a cause of action . . . may have become a part of the federal common law through the exercise of judicial power to fashion appropriate remedies for unlawful conduct. . . .

Still, the United States Court of Appeals for the Fifth Circuit concluded, "Without explicit instructions from Congress, we are bound to the plain language of the statute that limits suits to the terms of the plan at issue, rather than its scope to include suits for extracontractual and punitive damages."[37] Federal courts in many circuits across the country have followed the same path to the same end.[38]

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[37] *Medina*, 983 F. 2d at 32-33.

[38] *Harsch*, 956 F. 2d at 660-61; *McRae v. Seafarers' Welfare Plan*, 920 F. 2d 819, 820-21 (11th Cir. 1991); *Roberts v. Thorn Apple Valley, Inc.*, 784 F. Supp. 1538, 1541-42 (D. Utah 1992); *O'Neil v. GenCorp, Inc.*, 764 F. Supp. 833, 835-36 (S. D. N. Y. 1991); see also, *Gaskell v. Harvard Cooperative Society*, 762 F. Supp. 1539, 1543-44 (D. Mass. 1991).

Almost without exception, these federal courts base their refusal to develop the federal common law cause of action referred to in *Pilot Life* on the notion that such development would require the *overruling* of *Pi-*

The error of this reasoning is demonstrated unquestionably by the statement made by this Court regarding the progenitor of ERISA, the LMRA:

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lot Life. They also perceive the unanimous declaration in *Ingersoll-Rand Co. v. McClendon* of the power of federal courts to create federal common law causes of action to further the purposes of ERISA to be inconsistent with the bases of the holding in *Pilot Life*, but they declare that they do not believe this Court intended in *Ingersoll-Rand Co. v. McClendon* to overrule *Pilot Life*. The failure to perceive the consistency between these two decisions, as well as the failure to grasp the inapplicability of the holding in *Russell* to the request for relief pursuant to federal common law, stems from a failure to take into account the distinction between federal common law causes of action and implied causes of action. See, footnote 36, *supra*.

" . . . The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. *Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy.* The range of judicial inventiveness will be determined by the nature of the problem."[39]

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[39] *Textile Workers Union v. Lincoln Mills*, 353 U. S. at 457 (emphasis added). Compare *Medina*, 983 F. 2d at 31-32; *Lincoln Mills of Alabama v. Textile Workers Union of America*, 230 F. 2d 81, 88 (5th Cir. 1956), *rev'd*, 353 U.S. 448 (1957).

Conclusion

Several Federal Courts across the United States have declined to adopt a federal common law replacing the State laws and regulations pre-empted by ERISA. The result is a patent deviation from the direction prescribed by this Court in *Pilot Life* and indicated by the express, uncontradicted declarations of Congressional bodies, and an abandonment of American workers in their struggle to retain the retirement and insurance benefits which they have worked hard and long to purchase. The importance of ERISA to this Nation is signified by the attention this Court has devoted to it over the relatively short period since its enactment,[40] the number of workers and

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[40] *FMC Corp. v. Holliday*, 498 U.S. ____ , 111 S. Ct. 403 (1990); *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478 (1990); *Firestone Tire &*

their beneficiaries who depend upon employee benefit plans governed by it,[41] and the amount of money contained in employee benefit plans governed by it.[42]

In addition, preventing an ERISA beneficiary from bringing a lawsuit pursuant to 29 U. S. C. § 1132 (a), because she did not exhaust adminis-

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Rubber Co. v. Bruch, 489 U. S. 101 (1989); *Pilot Life Insurance Co. v. Dedeaux*, 481 U. S. 41 (1987); *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U. S. 134 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

[41] Statistical Abstract of the United States (11th ed. 1991), Table 685, at page 419 (According to the most recent figures [for 1989], ERISA plans contained pension benefits for more than fifty-two million workers and their beneficiaries, and group health benefits for more than seventy million workers and their beneficiaries).

[42] *Id.*, Table 596, at page 365 (more than one hundred billion dollars were contributed to ERISA plans in 1989).

trative remedies for benefits which she does not even seek to recover through the lawsuit, serves no purpose.

This Court should therefore issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit so that this Court can put the development and implementation of a body of federal common law of ERISA back on its proper course.[43]

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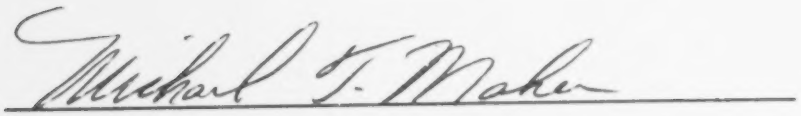
[43] This Court should also issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit so that this Court can permit ERISA beneficiaries to bring a lawsuit pursuant to 29 U. S. C. § 1132 (a) without the prerequisite of exhausting administrative remedies for benefits which the claimants do not seek to recover by way of the lawsuit.

Respectfully submitted,



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Crystal Cammack MEDINA,
Plaintiff-Appellant,

v.

ANTHEM LIFE INSURANCE COMPANY, f/k/a
American General Group Insurance Co.,
Defendant-Appellee

No. 92-1147

United States Court of Appeals,
Fifth Circuit

January 28, 1993

Crystal Cammack Medina sought to amend her complaint to add claims for recovery of extracontractual and punitive damages from her insurance carrier, Anthem Life Insurance Company ("Anthem"), under section 502 (a) (1) (B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U. S. C. § 1132 (a) (1) (B). She also sought recovery from Anthem of certain payments she had made to one of her doctors. The district court refused to find that section 502 (a) (1) (B) allows extracontractual and punitive

relief and also refused to grant Medina recovery of other payments because she failed to exhaust administrative remedies. We affirm.

I.

Medina works for Credit Finance Corporation, which is insured by Anthem, which presently insures Medina. In January 1988, Medina began a course of dental treatments during which her doctor submitted a request to Anthem for predetermination of a dental procedure. Anthem's claim committee reviewed the request, concluded that sufficient evidence did not exist to prove the medical necessity of the procedure, and refused to pay any benefit. Medina's doctor submitted the request again in 1990; Anthem's claim committee further reviewed the request

and once again reached the same conclusion.

In April 1990, Medina sought a second opinion from another doctor, who recommended a different procedure. Anthem's claim committee still determined that it would not cover the procedure. In June, Medina's attorney wrote to Anthem seeking to convince Anthem to approve the new procedure. Anthem sent Medina's records to the Medical Review Institute of American for an independent evaluation. When the institute recommended going forward with the procedure, Anthem approved the procedure on August 16, 1990.

The next day, Medina brought suit against Anthem in state court, seeking $10,035 as the cost of treatment, $50,000 for pain and suffering and

mental anguish, and $500,000 in punitive damages. Anthem removed the case to federal court.

Medina then filed an amended complaint that acknowledged that ERISA preempts her state law remedies. She requested that the court clarify her rights to future benefits, enjoin Anthem's "acts and practices," and award her costs and attorneys' fee.

On October 6, 1991, Medina sought leave to file a second amended complaint to add a claim for extracontractual and punitive damages based upon Anthem's handling of her claims. The magistrate judge refused to allow Medina to amend her complaint, finding that ERISA precludes the award of extracontractual and punitive relief.

On November 18, 1991, Anthem moved to dismiss the complaint for failure to exhaust administrative remedies. Anthem argued that it had paid all claims that Medina had submitted in accordance with its policy. All that remained was a disputed $1,363.20 that Medina averred to have paid her doctor for the latest procedure she had undergone. Anthem asserted that Medina never submitted proper documentation to Anthem's claims department, so Anthem had no obligation to reimburse Medina. The magistrate judge agreed and dismissed Medina's complaint for failure to exhaust administrative remedies.

II.

We turn first to Medina's contention that the magistrate judge erred in refusing to allow Medina to amend her complaint to add a claim for extracontractual and punitive damages. Medina urges us to develop a body of federal common law to supplement the express provisions of ERISA, which include no mechanism for awarding extracontractual or punitive damages. Joining the Seventh and Eleventh Circuits, we decline this invitation.

ERISA section 502(a) is the civil enforcement provision of the statute. It provides that

> [a] civil action may be brought-
>
> (1) by a participant or beneficiary -
>
> . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits to under the terms of the plan
>
> . . . .

The plain language of this statute does not mention recovery of extracontractual or punitive damages. Nothing in the statute instructs us to fashion a federal common law remedy to grant plaintiffs the right to recover punitive or extracontractual damages. Nevertheless, Medina asks us to do just that.

Medina points to legislative history that indicates a willingness on the part of Congress to allow federal courts to mold a federal common law of ERISA. The Conference Report describing ERISA section 502(a) states that a plan beneficiary may bring a civil action

> to recover benefits under the plan which do not involve application of the title I provisions, [and suits] may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.

H. R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 327, *reprinted in* 1974 U. S. C. C. A. N. 4639, 5107. As late as 1989, the House Budget Committee "reaffirmed the authority of the fed-

eral courts to shape legal remedies to fit the facts and circumstances of the cases before them, even though those remedies may not be specifically mentioned in ERISA itself." Report of the Comm. on the Budget, House of Rep., 101st Cong., 1st Sess. 55-56 (1989).

Unfortunately for Medina, Congress has had almost two decades to enact its putative intent into law and has not done so. Had Congress intended to develop ERISA remedies additional to the ones it specifically crafted, it has had ample opportunity to enact such legislation. Since Congress has not translated its intent into law, we are loathe to take this initiative on our own.

In *Pilot Life Ins. Co. v. Dedeaux*, 481 U. S. 41, 52, 107 S. Ct. 1549, 1555, 95 L. Ed. 2d 39 (1987), the Court considered whether Congress meant for the civil enforcement provisions of section 502(a) to be the exclusive remedy for beneficiaries. While the Court directed its opinion to the question of whether ERISA preempts a state law claim for improper processing of disability benefits, and decided that ERISA did preempt, it also noted that the text of the statute argues "strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." *Id.* at 54, 107 S. Ct. at 1556-57. The Court concluded that the "carefully integrated civil enforcement provisions found in 502(a) of the statute as finally enacted ...provide strong evidence that

Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Id.* (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U. S. 134, 146, 105 S. Ct. 3085, 3092, 87 L. Ed. 2d 96 (1983)).

In *Russell*, 473 U. S. at 144, 105 S. Ct. at 3091, the Court also addressed section 502 (a) (1) (B). Although the issue at bar in that case was whether a fiduciary to a plan may be held liable for extracontractual or punitive damages under ERISA section 409 (a), the Court turned to section 502 (a) (1) (B) for insight by analogy. *Id.* It noted that since that section "says nothing about the recovery of extracontractual damages...there really is nothing at all in the statutory text to support the conclusion" that the statute intended

to give "rise to a private right of action for compensatory or punitive relief." *Id.* The Court held that Congress did not intend for section 409 (a) to include any relief outside of that expressly authorized by the statute. *Id.*

Medina points out that the Court more recently has addressed this issue in *Ingersoll-Rand Co. v. McClendon*, 498 U. S. 133, ___ , 111 S. Ct. 478, 486, 112 L. Ed. 2d 474 (1990). In a case once more holding that ERISA pre-empts state law claims for damages for wrongful discharge the Court mentioned in dicta that "there is no basis in § 502 (a)'s language for limiting ERISA actions to those which seek "pension benefits.' It is clear that the relief requested here [compensatory and punitive damages] is well within the power of federal courts to provide."

Id. Both the Seventh and Eleventh Circuits have considered Ingersoll-Rand and nevertheless have refused to fashion an extracontractual or punitive remedy under section 502(a). In *McRae v. Seafarers' Welfare Plan*, 920 F. 2d 819, 821 n. 7 (11th Cir. 1991), Judge Wisdom, sitting by designation, explained the *Ingersoll-Rand* dicta as follows:

> We do not interpret these statements to mean that the remedies which the plaintiff in Ingersoll-Rand was seeking - future lost wages, mental anguish and punitive damages - are necessarily available under ERISA § 502 (a). The Supreme Court was stating that federal law provides relief for ERISA actions other than those that seek to recover pension benefits, such as the plaintiff's cause of action for wrongful termination. The Supreme Court is not holding that the specific remedies this plaintiff had sought under state law are necessarily the remedies that will be afforded him should he be granted relief under ERISA § 502.

The Court then went on to rely upon the reasoning in Russell to hold that section 502 (a) (3) precludes extracontractual remedies. *Id.* at 822. It refused to "create a federal common law of remedies for the benefit of the plaintiff on the sole authority of the House Committee Report." *Id.* at 823.

Similarly, in *Harsch v. Eisenberg*, 956 F.2d 651, 660 (7th Cir.), cert. denied, ___ U.S, ___ , 113 S. Ct. 61, 121 L. Ed. 2d 29 (1992), the court death with the *Ingersoll-Rand* dicta by declaring,

> We are not rash enough to believe that the Court intended to overrule settled law in most of the circuits, as well as narrowly limit-if not overrule-its own decision in Russell in such an off-hand manner...We will continue to doubt the availability of extracontractual damages under ERISA until a more plausible signal reaches us from above.

The court held that neither extracontractual nor punitive damages were available under section 502 (a) (1) (B). *Id.* at 660-61.[1]

We join the other circuits that have held that section 502 (a) (1) (B) does not allow the recovery of extracontractual or punitive damages. Like the court in *Harsch*, we are reluctant to believe that the Supreme Court intended us to create a body of federal common law based upon an off-hand statement in *Ingersoll- Rand*. The more direct language in *Pilot Life*, 481 U. S. 54, 107 S. Ct. at 1556, and *Russell*, 473 U. S. at 144, 105 S. Ct. at 3091, shows that the Court felt that the statutory enforcement scheme Congress crafted for ERISA in section

[1] *See also Reinking v. Philadelphia Life Ins. Co.*, 910 F. 2d 1210, 1219 (4th Cir. 1990) (denying claim for extracontractual damages for emotional distress).

502 (a) did not include a private remedy for extracontractual and punitive damages. Without explicit instructions from Congress, we are bound to the plain language of the statute that limits suits to the terms of the plan at issue, rather than arbitrarily extending its scope to include suits for extracontractual and punitive damages. The magistrate judge correctly refused to allow Medina to amend her complaint to include a claim for extracontractual and punitive damages under section 502 (a) (1) (B).

III.

We turn next to the issue of whether the magistrate judge properly dismissed Medina's claim for failure to exhaust administrative remedies. We first note that Medina's brief admits that Anthem has paid all benefits

due her in full. The only possible claim that might remain is the disputed bill for $1,363.20.

On July 11, 1991, Medina answered interrogatories put to her by Anthem. In answer to Interrogatory No. 11, Medina claimed that Anthem owed her $1,363.20 for a medical bill that Medina had paid and for which Anthem had not reimbursed her.

In its motion to dismiss for failure to exhaust administrative remedies, Anthem responds that it refused to reimburse Medina because she never filed any documentation with Anthem's claims department showing that she had paid the bill. Anthem asserts that it cannot process a claim unless it has received that claim and that it maintains a reasonable claim submission policy that Medina has ignored.

Anthem assures us that if Medina takes the initial step of submitting a claim, it will calculate her benefits accordingly.

As the magistrate judge noted, we have fully endorsed the prerequisite of exhaustion of administrative remedies in the ERISA context.[2] One of the policies underlying the exhaustion requirement was Congress' desire that ERISA trustees, not federal courts, be responsible for their actions that not

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[2] See *Simmons v. Willcox*, 911 F. 2d 1077, 1081 (5th Cir. 1990) (ERISA claimant who failed to file claim with insurance company failed to exhaust administrative remedies, so no cause of action existed); *Meza v. General Battery Corp.*, 908 F. 2d 1262, 1279 (5th Cir. 1990) (plaintiff may not make initial claim for benefits in a lawsuit); *Denton v. First Nat'l Bank*, 765 F. 2d 1295, 1303 (5th Cir. 1985) (Congress intended ERISA claimants to exhaust administrative remedies before resorting to federal courts).

every ERISA action becomes a federal case. *Denton*, 765 F. 2d at 1300.

We find that Medina has not exhausted her administrative remedies regarding the unpaid $1,363.20 bill. Medina has never filed a claim for the disputed sum. She obviously knows how Anthem's claims procedure operates, as she previously has filed claims for which Anthem reimbursed her. Medina may not make her first claim for the unpaid $1,363.20 in this lawsuit but must follow proper procedures in filing a claim with Anthem. Since she has not exhausted her administrative remedies, the magistrate judge correctly dismissed her complaint.

IV.

In summary, we refuse to fashion federal common law that would allow recovery of extracontractual and punitive damages under ERISA section 502 (a) (1) (B). We also find that Medina failed to exhaust her administrative remedies by failing to file a claim with Anthem for the disputed $1,363,20. Consequently, we AFFIRM the judgment of dismissal.

O R D E R

United States District Court
for the Northern District of
Texas

(November 12, 1991)

On this date came on to be considered Plaintiff's motion and supporting brief filed on October 16, 1991, seeking leave to file a second amended complaint together with Defendant's opposition filed on October 28, 1991, and the court finds and orders as follows:

Plaintiff seeks leave to amend her complaint to add a claim for punitive damages based upon Defendant's conduct in handling her insurance claims, which are pre-empted and governed by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U. S. C. § 1001, et seq.

In arguing in favor of her amendment to include a claim for punitive damages Plaintiff relies heavily on language which appears in the Supreme Court's recent opinion in Ingersoll-Rand Co. v. McClendon, ___ U.S. ___ , 111 S. Ct. 478 (1990). Although the court speaking through the opinion authored by Justice O'Conner held that a state law claim for wrongful discharge, based upon the plaintiff's claim that he was terminated by his employer to avoid contributing to his pension fund, was pre-empted by ERISA's provision, Justice O'Conner observed that "It is clear that the relief requested here is well within the power of federal courts to provide" (Id. at, 486).

Plaintiff argues that this language authorizes inter alia her claim for punitive damages. Plaintiff agrees that the decisions of federal appellate courts rendered prior to McClendon disallow claims for punitive damages. She cites two cases in which district courts have found that McClendon overruled previous appellate precedents. In Blue Cross and Blue Shield of Alabama v. Lewis, 753 F. Supp. 345 (N. D. Ala. 1990), the court found that McClendon gave federal courts the "green light to fashion ERISA remedies, which may include even punitive damages" (Id. at 347). In Ellis v. ANR Pipeline Co., 754 F. Supp. 103 (E. D. Mich. 1991), the court found that it was possible to state a colorable claim for fraud under the remedial provisions of ERISA, i.e. 29 U.S.C. § 1132 (a) and 1140.

ERISA, i.e. 29 U.S.C. 1132(a) and 1140.

Ellis is inapposite to the punitive damages claim which Plaintiff seeks to assert since it relates to a cause of action predicated on fraud and estoppel. Although Lewis's interpretation of McClendon supports Plaintiff's motion, it is to be noted that this construction has not been uniformly adopted. In Gaskell v. Howard Co-op Soc., 762 F. 2d 1539 (D. Mass. 1991), the court considered the plaintiff's contention that McClendon authorized extra-contractual relief and rejected the argument noting that "... had the Supreme Court intended to expand the realm of potential relief available under ERISA... it would have done so explicitly" (Id. at 1544).

Despite the differing results reached in Lewis and Gaskell, I am of the opinion that the reasoning in Gaskell is more persuasive and accurately reflects the current status of ERISA. Aside from the fact that I also believe that the Supreme Court would have expressly allowed punitive damages had it intended to overrule the federal appellate decisions to the contrary, to read McClendon as Plaintiff would have the court do would be to construe it as giving a "green light" to the lower federal courts to freely fashion whatever remedies cognizable under the common law which each judge might deem appropriate. Undoubtedly not all judges would feel impelled by the common law to expand the remedies expressly delineated in ERISA which would lead to disparate decisions around the country. Such a

state of affairs would be inimical to the express Congressional policy (29 U.S.C. 1144) recognized by the Supreme Court in Pilot Life Ins. Co. v. Dedeaux, 481 U. S. 41, 107 S. Ct. 1549 (1987), to assure uniformity in the area of benefit law.

Because the established law precludes the award of punitive damages and further because I do not believe that the single sentence in Justice O'Conner's opinion should be read to overrule such decisions or the decision in Pilot LIfe, Plaintiff's attempt to amend her complaint to include a claim of punitive damages would be futile.

IT IS, THEREFORE, ORDERED that Plaintiff's motion to file a second amended complaint is denied.

A copy of this order shall be transmitted to counsel for the parties.

ENTERED this 12th day of November, 1991.

UNITED STATES MAGISTRATE JUDGE

O R D E R

United States District Court
for the Northern District of
Texas

(January 3, 1992)

On this date came on to be considered Defendant's Motion to Dismiss for Failure to Exhaust Administrative Remedies filed on November 18, 1991, together with Plaintiff's response filed on December 9, 1991, and the court finds and orders as follows:

In this action Plaintiff seeks to recover the sum of $1,362.20 in connection with an Employee Welfare Benefit Plan. According to Defendant the question of whether Ms. Medina is entitled to any recovery is determined by whether her out-of-pocket expenses had exceeded $1,700.00 at the time she filed the claim on which her action is based, that is, for services rendered

by Arlington Memorial Hospital. Until her out-of-pocket expenses met this amount, Ms. Medina was obligated to make a 25% to 30% co-payment for medical expenses incurred.

In the course of discovery Plaintiff testified at her deposition on July 18, 1991, that she had paid Dr. Cole $1,400.00 for services rendered and on which she submitted claims to Defendant. Documentary evidence in support of her payment accompanied Plaintiff's Motion for Summary Judgment filed on August 9, 1991 (See Plaintiff's affidavit filed August 1, 1991, Exhibit 1). However, Defendant represents that Plaintiff has never submitted documentation to its claims department reflecting a $1,400.00 payment made directly to Dr. Cole, nor has Dr. Cole submitted an invoice to the claims department reflecting a

previous payment by Plaintiff for services rendered. Defendant contends that until a claim is presented for payment credit and documentation showing what services were rendered by Dr. Cole, its claims department cannot render a determination of whether Plaintiff paid the bill and whether the services rendered were for expenses covered by the Plan policy's terms. In failing to submit her claim in accordance with the policy's requirements Defendant argues that Plaintiff has failed to exhaust her administrative remedies thus requiring that her action be dismissed.

In her response Ms. Medina does not dispute the fact that she has not submitted materials to Defendant's claims department, but submits that Defendant is now in possession of information sufficient to permit it to

determine what portion of Dr. Cole's services are covered, and that Defendant should be estopped from relying on Plaintiff's failure to submit a claim. She further argues that it would be patently futile to require her to exhaust administrative remedies.

The prerequisite of exhaustion of administrative remedies has been fully endorsed by the Fifth Circuit. Although Plaintiff argues that the exhaustion requirement may be waived where pursuit of such remedies would be futile, the case on which she relies, i. e., Hessbrook v. Lennon, 777 F. 2d 999 (5th Cir. 1985) is inapposite. Hessbrook involved the issue of whether a federal inmate was required to exhaust administrative remedies under the Federal Tort Claims Act, where he was seeking to institute a Bivens

action against federal employees. Further, despite the fact that the Court in Hessbrook recognized that a showing of futility might warrant a waiver of the exhaustion requirement, it refused to apply it in that case.

Ms. Medina has cited no case in the context of an ERISA action in which a court has relieved a claimant from the obligation of exhausting administrative remedies. In Denton v. First National Bank of Waco, Texas, 765 F. 2d 1295 (5th Cir. 1985), the Court refused the plaintiff-appellant's futility argument, notwithstanding the fact that many of the persons who were on the committee which turned down his earlier request for lump sum retirement benefits were also members of the reviewing panel (Id. 1300-1303). Compared with the facts related in Denton, Plaintiff's

situation is much less compelling since she has not completed the initial step of filing a claim, nor has she shown any reason to believe that if presented, her claim would not be determined in accordance with the Plan's provisions.

The Fifth Circuit's strong approval of the Ninth Circuit's decision in Amato v. Bernard, 618 F. 2d 559 (9th Cir. 1980), further supports the conclusion that futility should not be found, except in the most compelling circumstances. See also Simmons v. Willcox, 911 F. 2d 1077, 1081 (5th Cir. 1990).

The fact that information has come to light during discovery in this action which arguably might support Plaintiff's position does not warrant abandonment of the established exhaustion requirement. To allow a claimant

to assert her initial claim for benefits by filing a lawsuit would undermine the very policies underlying the exhaustion requirement. cf. Meza v. General Battery Corp., 908 F. 2d 1262, at 1279 (5th Cir. 1990).

Plaintiff also argues, without evidentiary support, that she is suffering from irreparable harm and suggests that to require her to submit her claim to Defendant is tantamount to letting the fox guard the hen house. This conceptual view of the relation between an insured and a Plan's administrator has not been accepted by Congress or the courts. e. g. Denton v. First National Bank of Waco, Texas, supra, at 1303, n. 13.

IT IS, THEREFORE, ORDERED that Defendant's Motion to Dismiss is granted and that Plaintiff's action is dismissed without prejudice for failure to exhaust administrative remedies.

A copy of this order shall be transmitted to counsel for the parties.

ENTERED this 3rd day of January, 1992.

UNITED STATES MAGISTRATE JUDGE